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9 Honorable Marsha J. Pechman
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11 UNITED STATES DISTRICT COURT
12 WESTERN DISTRICT OF WASHINGTON AT SEATTLE
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14 DIANNE L. KELLEY and KENNETH
15 HANSEN,

NO. C07-0475 MJP

16 Plaintiffs,

PLAINTIFFS' RESPONSE RE:
MOTION TO SEAL

17 v.

CLASS ACTION

18 MICROSOFT CORPORATION, a Washington
19 Corporation,

NOTE ON MOTION CALENDAR:
October 29, 2007

20 Defendant.
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26 Plaintiffs submit this response regarding the Motion to Seal, filed on October 5, 2007.
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28 Dkt 59; see also Dkt. 75 (Microsoft's submission in support of motion).

- 29
30 1. **Plaintiffs' Motion for Application of Washington Law [only 2:11,
31 2:13-16, 2:18-24, 3:12-20, and 14:15-16 contain excerpts from materials
32 containing confidentiality designations]**

33 Microsoft requests that the above lines of text from Plaintiffs' Motion for Application of
34 Washington Law be redacted and that an unredacted version of the motion be filed. These lines
35 of text contain either references to or quotations from documents attached as Exhibits C, D, and
36 F to the Declaration of William C. Smart (Dkt. 61), each of which Microsoft designated as
37 "confidential." Aside from the issue of whether the exhibits themselves need to be sealed from
38 public view (see below ¶¶ 2-4), the few references to and quotations from those exhibits as set
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PLAINTIFFS' RESPONSE RE: MOTION TO SEAL - 1
No. C07-0475 MJP

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1 forth in the motion are selective, brief, and truncated in nature—and, thus, provide insufficient
2 context to render them of any material importance to Microsoft's competitors without reviewing
3 the exhibits as well. Accordingly, plaintiffs do not believe that Microsoft has provided sufficient
4 justification for Plaintiffs' Motion for Application of Washington Law to be redacted.
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7 2. **Smart Declaration, Exhibit C:** Designed for Microsoft Windows and
8 Windows Vista Logo Licensing Agreement

9 As Microsoft notes (see Dkt. 76 ¶ 15), the asserted justification to seal the Designed for
10 Microsoft Windows and Windows Vista Logo Licensing Agreement was put at issue in a prior
11 motion to seal that is pending before the Court. See Dkt. 45. Plaintiffs incorporate their
12 argument in opposition to seal as set forth in their prior submission on this issue. See Dkt. 58 at
13 2:1-22. In sum, the Logo Licensing Agreement is directly related to Microsoft's Windows Vista
14 Capable Marketing Program, which by its terms has expired. Therefore, the Logo Licensing
15 Agreement does not have the "commercial sensitivity" Microsoft would have Court believe. Id.
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18 3. **Smart Declaration, Exhibit D:** Microsoft Business Terms Document for
19 OEM Customers

20 This is a form document with no OEM named. As noted on MS-KELL 207, the
21 document has expired by its own terms. Microsoft has provided insufficient justification for this
22 document to be sealed.
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25 4. **Smart Declaration, Exhibit F:** OEM Marketing Bulletin: Windows
26 Vista Capable Program

27 Whether the OEM Marketing Bulletin should be sealed also is at issue in the prior motion
28 to seal pending before the Court. See Dkt. 45. Plaintiffs incorporate their arguments in
29 opposition to seal as set forth in their prior submission on this issue. See Dkt. 58 at 2:24-39.
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31 The OEM Marketing Bulletin describes the Windows Vista Capable Marketing Program, which
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1 has been terminated. Microsoft's prior efforts to keep the terms of its marketing programs secret
 2 cannot alone justify sealing those expired documents when later used in court.
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5 **5. Plaintiffs' Motion for Class Certification [only 3:1-5, 3:7-41, 4:1-9, and**
 6 *15:11-17 contain excerpts from materials containing confidentiality*
 7 *designations]*

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 9 Microsoft requests that the above lines of text from Plaintiffs' Motion for Class
 10 Certification be redacted and that an unredacted version of the motion be filed. This text either
 11 refers to or quotes from the OEM Marketing Bulletin (see above ¶ 4). Even if the Court finds
 12 Microsoft has met its burden to have the bulletin sealed from the public's eyes, the portions of
 13 plaintiffs' motion that refer to or quote from that document still need not be redacted. These
 14 portions either state the obvious, do not quote or refer to any "commercially sensitive" material
 15 in the bulletin, or have been made public in other "non-confidential" documents already on file
 16 with the Court. See, e.g., Dkt. 66-3 (re-stating and summarizing purposes of Windows Vista
 17 Capable Marketing Program). Plaintiffs do not believe that Microsoft has provided sufficient
 18 justification for their Motion for Class Certification to be filed in redacted form.
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21 **6. Tilden Declaration, Exhibit A: OEM Marketing Bulletin: Windows**
 22 *Vista Capable Program*

23 This is the same document as Exhibit F to the Smart Declaration. Therefore, plaintiffs
 24 incorporate their opposition herein.
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26 **7. Tilden Declaration, Exhibit L: Pages 1-2, 50-51, 67-69, and 88 from the**
 27 *Transcript of the 30(b)(6) Deposition of Microsoft (Mark Croft) [only*
 28 *50:1-9 contain confidentiality designations]*

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 30 The text at 50:1-9 of the Transcript of the 30(b)(6) Deposition of Microsoft (Mark Croft)
 31 was designated as "confidential" by Microsoft. However, that specific portion of Page 50 of the
 32 transcript was not referred to or quoted from in Plaintiffs' Motion for Class Certification.
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1 Microsoft acknowledges that this portion of Page 50 "does not disclose commercially sensitive
2 information," and thus does not propose an order that any portions of the Croft Deposition
3 transcript (Exhibit L to the Tilden Declaration) be redacted or sealed. See Dkt. 75 at 5 n.6.
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5 Accordingly, this exhibit should be publicly available.

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8 DATED this 29th day of October, 2007.
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11 **GORDON TILDEN THOMAS & CORDELL LLP**
12
13

14 By 
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16 Jeffrey I. Tilden, WSBA #12219
17 Jeffrey M. Thomas, WSBA #21175
18 Michael Rosenberger, WSBA #17730
19 Mark A. Wilner, WSBA #31550
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21

22 **KELLER ROHRBACK L.L.P.**
23
24

25 By 
26

27 William C. Smart, WSBA #8192
28 Ian S. Birk, WSBA #31431
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31 Attorneys for Plaintiff
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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following.

<p><u>Counsel for Defendant Microsoft Corporation</u></p> <p>Stephen M. Rummage, WSBA #11168 Cassandra L. Kinkead, WSBA #22845 Charles S. Wright, WSBA #31940 Davis Wright Tremaine LLP 1201 Third Avenue Suite 2200 Seattle, Washington 98101-3045 steverummage@dwt.com cassandrakinkead@dwt.com charleswright@dwt.com</p>	<p><u>Counsel for Defendant Microsoft Corporation</u> – Admitted Pro Hac Vice</p> <p>Charles B. Casper Montgomery, McCracken, Walker & Rhoads 123 South Broad Street Philadelphia, PA 19109 ccasper@mmwr.com</p>
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PLAINTIFFS' RESPONSE RE: MOTION TO SEAL - 5
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